APPENDIX A

UNITED STATES COURT OF CLAIMS

Nos. 73-55 and 272-55

WILLIAM K. WARREN, ET AL

v.

THE UNITED STATES

Clerk's Office
Washington, D. C., July 13, 1959

To Attorney of Record and Assistant Attorney General, and Commissioner .....

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing and for relief the following order:

Overruled.

Very truly yours,

WILLARD L. HART
Clerk, Court of Claims.

APPENDIX B

[Heading Omitted]

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiffs sue for the refund of a part of the income taxes paid by them for the years 1949 through 1952. They paid their taxes for these years on the basis that the income in question was ordinary income. Their claim in these suits is that the income was long-term capital gain, taxable at a lower rate.

In 1938 the Corpus Christi Corporation was organized under Texas law to acquire and develop oil and gas properties in some 8,782 acres of land in three counties in Texas. Of Corpus Christi's 5,000 shares of stock, The Chicago Corporation owned 1,250 and the other 3,750 were owned by the plaintiffs and other persons.

By May 5, 1941, some 18 producing wells had been brought in on about 2,200 acres of the property. The other 6,000 acres of the land had not been tested. A high-pressure recycling plant had been constructed to extract the saleable distillate from the wet gas and reinject the dry gas into the earth to exert pressure on the wells. The necessary financing to continue and expand the development of the property was a problem to the plaintiffs and they sought to dispose of their stock in Corpus Christi. They negotiated with a number of individuals and corporations, including Chicago, which, as we have seen, already owned 20 percent of the stock of Corpus Christi. Chicago offered to buy the stock of the other shareholders, if it could get enough of it so that it would hold at least 80 percent of the stock, the minimum amount required under Texas law to enable it to liquidate the corporation, and under section 112(b)(6) of the Internal Revenue Code of 1939 to accomplish the liquidation of a corporate subsidiary tax free. Chicago was to pay the selling shareholders $163.63 per share, plus an additional specified cash amount if the liquidation turned

out to be, in fact, tax free. In addition, Chicago, agreed to convey to each shareholder who sold his stock to Chicago, an "overriding royalty" in the oil, gas and other products of the Corpus Christi leases. In the gas and oil industry, an "overriding royalty" means a fraction of the working interest which by agreement is relieved of the expense of the development and production.

The sale of the Corpus Christi stock was accomplished and Corpus Christi was liquidated. In general terms the situation was, then, that the land owners who had made the leases to Corpus Christi had a royalty interest in the mineral products produced, presumably a one-eighth royalty interest, Chicago had the "working interest," presumably seven-eighths, which had formerly belonged to Corpus Christi, less the "overriding royalty" which Chicago had in the purchase of stock transaction, conveyed to the selling stockholders.

This small overriding royalty owned by the plaintiffs was, under Texas Law, a property interest, *Rogers National Bank of Jefferson* v. *Pewitt*, 231 S.W. 2d 487, and was recorded in the land records of the appropriate counties. In the agreement between Chicago and the plaintiffs creating the overriding royalty in the plaintiffs, Chicago, as the holder of the working interest in the leases, agreed to pay all the expenses of development, operation and exploration, and to diligently prosecute these activities. The plaintiffs had the right to take their share of the product in kind, or to give "division orders" to Chicago to sell their share of the products for their account and pay the money over to them. During all of the times pertinent in this suit such division orders were in effect.

In the plaintiffs' tax returns for 1941, the year in which they sold their Corpus Christi stock to Chicago, they reported as long-term capital gain the excess of the cash paid them by Chicago over what their Corpus Christi stock had cost them. They did not include in their capital gain

any value for the overriding royalties which they received in the transaction, stating that those interests had no ascertainable market value. The taxing authorities, however, placed a value of $1,035,000 upon those interests of all the minority stockholders, and added proportionate parts of that amount to the capital gains of the plaintiffs. Presumably they paid taxes on these additional amounts of capital gain.

The properties proved highly productive. From July 1, 1941 to the end of 1956 Chicago remitted to the plaintiffs and the other former stockholders $11,548,107.84 as the amount of the proceeds of their overriding royalty share of the products.

For the taxable years 1949 through 1952 here in question, the plaintiffs included, in their returns, their receipts from their royalty interests as ordinary income subject to the statutory 27½ percent depletion allowance. So far as appears, they had also treated that income similarly for the years 1941 through 1948. For the years 1949 through 1952 they filed timely claims for refund on the ground that the receipts from their overriding royalties were additional amounts received by them as a part of the price of their sale of their Corpus Christi stock to Chicago in 1941, and should, therefore, be taxed at capital gains rates.

When the plaintiffs sold their Corpus Christi shares to Chicago in 1941 they, as we have seen, received some cash, a promise of some more cash if the purchaser was not required to pay a tax on its profit made out of the liquidation of Corpus Christi, and the "overriding royalty" in the oil and gas. This last item was, as we have seen, a property interest. If it had been a more normal, more tangible kind of property, its value would as a matter of course have been added to the cash received and the plaintiffs' gain would have been computed on the combined figure. If, although the property interest received was of an unusual nature, such as an overriding royalty, it had

a market value which could be reasonably estimated, the same computation would be made. If such an estimation was made by the taxpayer, and the Government agreed to it, and the capital gain tax was paid on that basis, that would end the capital gain matter for that transaction, subject, presumably, to whatever rights the statutes give to either the taxpayer or the Government to reopen it within prescribed periods.

If the matter was closed in the manner just indicated, the subsequent tax treatment of the newly acquired property would be normal. If the property produced income, such as rent, the rent would be taxed as such. If, as an interest in oil or gas property, it produced oil or gas or the income from the sale of those minerals, the income would be taxed, after the deduction of the statutory depletion allowance.

The plaintiffs say that these normal consequences of the sale of property do not obtain in the instant case because the "property" which the Government says the plaintiffs received in the transaction with Chicago was not, they say, reasonably susceptible of valuation at the time they received it. The fact that the Government valued the overriding royalties of all of the holders of such interests at $1,035,000 in 1941, and the holders received, in the next fifteen years alone, $11,548,107.84 shows that the estimated value was a rough and inaccurate guess.

The plaintiffs say that whatever money they got in, as a consequence of the sale of their Corpus Christi stock, was a part of the sale price, though its receipt was unanticipated and delayed. If, as one item of consideration for the sale of property, the seller took in an empty apartment building in a ghost town, the building having a negligible market value, and shortly thereafter because of the location by the Government of an atomic or other large project in the area, the apartment building became a gold mine of income, the owner could truthfully say that the income was a consequence of his sale of his property and his receipt of the apartment building as a part of the price. But he could

hardly say that his income from the apartment building, for all time to come or for any time, was deferred purchase money received from his sale.

The plaintiffs would, we suppose, distinguish the situation just described because, in the plaintiffs' case, Chicago as the owner of the working interest had agreed to do all of the operating and development and exploration work, and the plaintiffs had nothing to do but cash their royalty checks when, as and in whatever amounts they came in. But this is the situation of any owner of a royalty interest, and of any person who has income from bonds, notes, or stocks which pay dividends.

As to the controverted question of whether the plaintiffs' overriding royalties were, in 1941, reasonably susceptible of valuation, we have concluded that the question need not be answered. If, at the time the plaintiffs' capital gains were being computed for the 1941 transaction, the plaintiffs had sought a refund because the Government's valuation was too high, or the Government had assessed a deficiency because the plaintiffs' return showed too low a valuation, a court would have had to determine a valuation, or to decide that it was not possible to determine one. See *Burnet* v. *Logan*, 283 U.S. 404; *Philadelphia Park Amusement Co.* v. *United States*, 130 C. Cls. 166, 126 F. Supp. 184. If it did the latter, the further tax consequences would depend upon the nature of the interest found unsusceptible of valuation. If it was income producing property, such as the apartment house referred to above, the Government would get its revenue by taxing the income as received, and by taxing the capital gain when the building was next sold, since it would have a low cost basis. If the interest found unsusceptible of valuation was not a property interest, and therefore not capable of producing ordinary income which could be taxed as such, any further receipts from such an interest would be additional payments of purchase price, further capital gains from the sale, and taxable as such. If one, for example, promised to pay

$10,000 for a house, and to pay $5,000 more if he made a profit of $50,000 in a certain independent speculative venture in which he was engaged, the $5,000, if received, would be an addition to the sale price of the house, and taxable to the seller as capital gain. This was the situation in *Burnet* v. *Logan*, *supra*, and in *Haynes* v. *United States*, 100 C. Cls. 43, and *Tuttle* v. *United States*, 122 C. Cls. 1.

In the three cases just cited, the additional payments to be received were contingent upon the production of minerals from specified properties. The transactions did not, however, give to the contingent payee any property interest in the land or the minerals. None of the income from those properties was taxable to him as his income. He, of course, had a very lively "interest" in the fact that minerals should be produced from those properties, just as the man in the illustration above had an "interest" in the success of his purchaser's independent speculative venture.

It is apparent from what we have said that our view is that income received by an owner of a property interest is taxable to him as such, and that the fact that he received the property interest as a part of the sale price of property is irrelevant. The fact that the income is in large amounts only proves that he made a profitable deal when he accepted the property interest which later produced the income. The hope and belief that, by an exchange of money for property, or property for other property, income will be increased because the property received will produce more income than the money or property parted with, is the motive for most commercial transactions. To select one type of such transactions, as the plaintiffs would have us do, for special treatment would introduce confusion into an already difficult field of taxation

The plaintiffs' petitions will be dismissed.

It is so ordered.

MARIS, *Circuit Judge* (*Ret.*), sitting by designation, and WHITAKER, *Judge*, concur.

APPENDIX C

JONES, *Chief Judge*, dissenting:

I respectfully dissent from the conclusion reached by the majority. The findings of fact clearly show that there was an outright sale of the Corpus Christi stock to The Chicago Corporation; that payment was made partly in cash and partly in overriding royalties.

These royalties were wholly unlike the house or apartment rental illustration which is used in the majority opinion. The royalties were a part of the corpus of the property and were in no ordinary sense a payment for a use of the property. It is as if the purchaser of the house or apartment in question had sold a 1/20 interest each year until the entire house or apartment had been disposed of.

In other words, every barrel of oil that is taken out of the ground is a part of the property itself, and when the oil has been taken out of the property by the royalty, the entire ownership is gone.

Although there were several steps involved, the deal through which plaintiffs' stock in Corpus Christi was sold to Chicago, partly for cash and partly in return for the overriding oil and gas royalties, was in reality a single transaction. As I view it, the controlling point in these cases is the fact that the overriding royalties received by plaintiffs had no ascertainable fair market value at the time plaintiffs transferred their interests. In the many cases treating of oil and gas royalties for the purpose of deciding whether there has been a gain or loss under section 111 of the 1939 Internal Revenue Code for property sold or exchanged, it has always been held that the question of whether the royalties received by the taxpayer have an ascertainable fair market value is a question of fact. Where the factors affecting the valuation are so uncertain, contingent, or speculative that the value cannot be determined with reasonable accuracy, it must be held that the oil and gas interests have no fair market value. That is the situa-

tion here as found by the trial commissioner who heard and considered all the evidence bearing on the question. The reasons for this finding of lack of any market value at the time of the transfer are set out in findings 30, 31, and 32. For some reason the majority has seen fit to eliminate these findings.

I think these findings are vital and should be restored. They reveal the issue here to be very similar to that decided by the Supreme Court in *Burnet* v. *Logan*, 283 U.S. 404. The facts affecting the value of the overriding royalties in the instant cases contain more uncertain, unusual, and speculative elements than were present in other cases where it was held that the oil and gas interests considered had no ascertainable fair market value. *Edwards Drilling Co.* v. *Commissioner*, 35 B.T.A. 341; *Rocky Mountain Development Co.* v. *Commissioner*, 38 B.T.A. 1303. The facts before us show that the only petroleum product of any consequence recovered by Corpus Christi from the land up to the time plaintiffs' stocks were disposed of was wet gas. There was no market for the gas and the market for the distillate extracted therefrom was unstable and uncertain. Just prior to the closing of the transaction in suit, the only prospect held out to plaintiffs for recovering the money they had sunk in the venture was the revamping and enlarging of the recycling plant at an expenditure of $855,000 and by the drilling of additional oil wells. It was suggested that additional products could be recovered from the new plant but whether there would be a market for these and at what price was not known. Oil production was negligible and most of the property was unproven territory. The petroleum engineers who made the reports described in the findings pointed out the indefinite and unknown conditions existing in a considerable portion of the leased land and neither would hazard an estimate as to future oil production. As part of the price for plaintiffs' stocks, Chicago agreed to drill additional oil and gas wells.

but as shown in finding 9, this obligation was subject to contingencies which might never occur.

Added to the above, we have the undisputed showing that plaintiffs failed in their efforts to have several major oil companies place a value upon or make an offer for the properties. Not only were no offers forthcoming, but one major oil company with extensive holdings in the same general area advised plaintiffs to dispose of their interests as quickly as possible.

The taxing authorities placed a value of $1,035,000 on the interests of the minority stockholders, but this valuation was, of necessity, a pure estimate. There are formulas and equations available for estimating the value of almost any kind of property where the use of such methods is appropriate. But estimates do not meet the statutory test of "fair market value." If these words mean anything, they assume, first, the existence of a market for the particular property, and, second, the presence of sufficient facts to enable fair-minded men to determine the value in that market within the bounds of reasonable accuracy. If the next day or shortly thereafter it had been shown that only dry holes could be found, there is not the slightest doubt that the plaintiffs could have come back and shown the inaccuracy of the collector's estimate, and could have on that ground secured a deduction or a refund. In other words, these estimates are not necessarily final.

The facts in this record demonstrate that when plaintiffs' stocks were sold, the circumstances that would normally be relied upon to determine market value were shrouded in uncertainty and dependent upon the outcome of future developments. In the light of that record, I would adopt all the findings made by the trial commissioner and hold that since the overriding royalties had no ascertainable fair market value, the sale of plaintiffs' stocks resulted in an open transaction. On this basis, the payments received by plaintiffs from the sale of the oil and gas produced

from the land would be taxable as long-term capital gain because of the open transaction aspect, but no allowance would be made to plaintiffs for depletion. *Burnet* v. *Logan*, *supra*; *Commissioner* v. *Carter*, 170 F. 2d 941.

LARAMORE, *Judge*, joins in the foregoing dissenting opinion.

APPENDIX D

STATUTE INVOLVED

Internal Revenue Code of 1939:

"SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this chapter, shall be determined under the provisions of section 112.

* * * * *

"SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property, the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * *

"SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * *

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall

be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112.

* * * *

"SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term 'capital assets' means property held by the taxpayer * * * [other than inventory and other assets not related here].

* * * *

(4) *Long-term Capital Gain.*—The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing gross income."

APPENDIX E

COMMISSIONER OF INTERNAL REVENUE v. CARTER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

Nov. 29, 1948

Before L. HAND, *Chief Judge*, and SWAN and CHASE, *Circuit Judges*.

SWAN, *Circuit Judge*.

This appeal presents the question whether income received by the taxpayer in 1943 is taxable as long-term capital gain, as the Tax Court ruled, or as ordinary income as the Commissioner contends. The facts are not in dispute. The taxpayer, Mrs. Carter, had owned for ten years all the stock of a corporation which was dissolved on December 31, 1942. Upon its dissolution all of its assets were distributed to her in kind, subject to all its liabilities which she assumed. In the distribution she received property having a fair market value exceeding by about $20,000 the cost basis of her stock, and she reported such excess as a capital gain in her 1942 return and paid the tax thereon. In the corporate liquidation she also received 32 oil brokerage contracts which the parties stipulated had no ascertainable fair market value when distributed. Each contract provided for payment to the corporation of commissions on future deliveries of oil by a named seller to a named buyer. The contracts required no additional services to be performed by the corporation or its distributee, and the future commissions were conditioned on contingencies which made uncertain the amount and time of payment. In 1943 the taxpayer collected commissions of $34,992.20 under these contracts. She reported this sum as a long-term capital gain; the Commissioner determined it to be ordinary income. The Tax Court held it taxable as capital gain. The correctness of this decision

is the sole question presented by the Commissioner's appeal.

Mrs. Carter's stock was a "capital asset" as defined by section 117(a) of the Internal Revenue Code, 26 U.S.C.A. § 117(a). In exchange for her stock, she received the assets of the corporation upon its dissolution. The tax consequences of such a transaction are controlled by section 115(c), 26 U.S.C.A. § 115(c), which provides that "the gain or loss to the distributee resulting from such exchange" shall be determined under section 111, 26 U.S.C.A. § 111, but recognized only to the extent provided in section 112, 26 U.S.C.A. § 112. Turning to section 111(a): the "gain from the sale or other disposition of property" is the excess of "the amount realized therefrom" over the adjusted cost basis provided in section 113(b), 26 U.S.C.A. § 113(b). Paragraph (b) of section 111 defines the "amount realized from the sale or other disposition of property" to be the sum of money received "plus the fair market value of the property (other than money) received." Paragraph (c) of the same section provides that "In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this chapter, shall be determined under the provisions of section 112." That section lays down the general rule, subject to exceptions not pertinent to the case at bar, that "upon the sale or exchange of property" the entire amount of the gain or loss, determined under section 111, shall be recognized. From the foregoing statutory provisions, it is obvious that if the oil brokerage contracts distributed to the tax payer had then had a "fair market value", such value would have increased correspondingly the "amount realized" by her in exchange for her stock and would have been taxable as long-term capital gain, not as ordinary income. Boudreau v. Commissioner of Internal Revenue, 5 Cir., 134 F. 2d 360; Fleming v. Commissioner of Internal Revenue, 5 Cir., 153 F. 2d 361. The question presented by the present appeal is whether a different

result is required when contract obligations having no ascertainable fair market value are distributed in liquidation of a corporation and collections thereunder are made by the distributee in later years.

In answering this question in the negative, the Tax Court relied primarily upon Burnet v. Logan, 283 U.S. 404, 51 S. Ct. 550, 75 L. Ed. 1143. That involved a sale of stock, not a distribution in liquidation, under which the seller received cash and the buyer's promise to make future payments conditioned on contingencies. The cash received did not equal the seller's cost basis for the stock, and the contingencies affecting future payments precluded ascribing a fair market value to the buyer's promise. In later years payments were made which the seller did not return as income. The decision held that she was not required to do so. With respect to such payments, the court said, 283 U.S. at pages 412, 413, 51 S. Ct. at page 552.

"As annual payments on account of extracted ore come in, they can be readily apportioned first as return of capital and later as profit. * * * When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was $2,200,000 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. * * * She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture."

The Commissioner argues that the Logan case is inapplicable because there the taxpayer had not recovered the cost basis of her stock while here she had. The Tax Court thought the distinction immaterial. We agree. The Supreme Court spoke of the annual payments as constituting

"profit" after the seller's capital investment should be returned. Until such return it cannot be known whether gain or loss will result from a sale; thereafter it becomes certain that future payments will result in gain. No reason is apparent for taxing them as ordinary income. As this court said in Commissioner of Internal Revenue v. Hopkinson, 2 Cir., 126 F. 2d 406, 410, "payments received by the seller after his basis had been extinguished would have been taxable to him as capital gains from the sale of the property," citing Burnet v. Logan as authority.[1]

The Commissioner also urges that the Logan case is distinguishable because it dealt with a sale of stock rather than exchange of stock for assets distributed in a corporate liquidation. This contention is answered by White v. United States, 305 U.S. 281, 288, 59 S. Ct. 179, 83 L. Ed. 172, and Helvering v. Chester N. Weaver Co., 305 U.S. 293, 295, 59 S. Ct. 183, 83 L. Ed. 180, where the court held that the recognition required by section 115(c) of gains and losses on liquidations must for purposes of computation of the tax, be taken to be the same as that accorded to gains and losses on sales of property. Consequently we agree with the Tax Court's ruling that the principle of the Logan case is applicable to a corporate liquidation where stock is exchanged in part for contracts having no ascertainable market value, and that future collections under such contracts are taxable as capital gain in the year when received if the distributee has previously recovered the cost basis for the stock.

The Commissioner's argument that such collections are analogous to the receipt of interest or rent upon bonds or real estate distributed in a corporate liquidation overlooks a significant distinction. Payment of interest or rent does

[1] For similar rulings see Haynes v. United States, 50 F. Supp. 238, 100 Ct. Cl. 43; United States v. Yerger, D.C., 55 F. Supp. 521; Hill's Estate v. Maloney, D.C., 58 F. Supp. 164; Nicholson v. Commissioner of Internal Revenue, 3 T.C. 596.

not impair the value of the bond or real estate since each remains as a capital asset regardless of the number of payments. See Helvering v. Manhattan Life Ins. Co., 2 Cir., 71 F. 2d 292, 293. But with respect to the oil brokerage contracts, under which no additional services were to be rendered by the payee, each payment decreases their value until, with the final payment it will be completely exhausted; and, if the payments be treated as income, the distributee has no way to recoup his capital investment, since concededly he has no economic interest in the oil producing properties and therefore no right to depletion deductions.[2] Hence to consider the brokerage payments as ordinary income would produce a most unjust result and one quite unlike the result which follows the distribution of bonds or real estate in a corporate liquidation.

For the foregoing reasons we think the decision of the Tax Court correct. It is affirmed.

[2] It is true, in the case at bar, the taxpayer had no capital investment in the brokerage contracts because from other assets distributed she had already recovered the cost basis of her stock and the oil brokerage contracts had no ascertainable fair market value. But the Commissioner's analogy argument would be equally applicable if the brokerage contracts had been the only corporate assets distributed and if had been possible to ascribe to them a fair market value of $21,000. In that case, the distributee's capital investment in the brokerage contracts would have been $20,000, the cost basis of her stock being $1,000. She would be entitled to recover her capital investment before she could be charged with receiving either gain or ordinary income, and the only source of recovery would be the payments which would ultimately exhaust the value of the contracts. Hence the answer given above to the analogy argument is apposite.

APPENDIX F

WESTOVER ET AL. V. SMITH

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Feb. 21, 1949

Before HEALY, BONE and ORR, *Circuit Judges.*

ORR, *Circuit Judge.*

This is an appeal from a decision of the district court holding that income received by Smith, the taxpayer, in 1941 and 1943 was taxable as capital gain rather than as ordinary income, and ordering a refund to the taxpayer of certain taxes erroneously collected.

The taxpayer was owner of all the stock of Quickwork Company, a corporation engaged in the manufacture and sale of machine tools. In 1940 Quickwork Company sold all of its assets to Whiting Corporation in exchange for cash and the right to receive 10% of the gross sales price of machinery to be manufactured and sold by Whiting Corporation, pursuant to patents theretofore held by Quickwork Company. Following this transaction Quickwork Company liquidated and dissolved. The distribution in liquidation netted the taxpayer $39,204.26 in cash and the assignment of the contract under which Whiting Corporation was required to make future royalty payments.

Since the adjusted basis of the taxpayer's stock on the date of liquidation was $34,000, she paid a capital gain tax on the $5,204.26 cash profit. While the contractual right she held had a very substantial value, there was, owing to future business contingencies, no way of ascertaining its fair market value. Thus, no value was assigned to it in the liquidation distribution. When payments were made by Whiting Corporation to the taxpayer in 1941 and 1943 under the contract, such payments were treated as ordinary income and income tax payments were made accord-

ingly. Taxpayer contends that the receipt of moneys from Whiting Corporation was an integral part of the liquidation distribution, and therefore such sums are to be treated as payments in exchange for stock under § 115(c) of the Internal Revenue Code, and taxed as a capital gain in the amount determined pursuant to § 111 of the Internal Revenue Code.[1]

Doubtless the value of the contract would be computed as a capital gain were it found to have an ascertainable market value at the time of Quickwork Company's liquidation. The taxpayer insists that the rule is the same in the present situation, where the value of the contract depends on uncertain future payments; that the transaction remains open until all payments are completed. Burnet v. Logan, 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143, is cited. The Supreme Court of the United States, in that case, dealt with the sale of stock for cash plus a contractual

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[1] Relevant portions of the Code are as follows:

"§ 115. (c) Distributions in liquidation. Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111. * * *" 26 U.S.C.A. § 115(c).

"§ 111. Determination of amount of, and recognition, of gain or loss.

"(a) Computation of gain or loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

"(b) Amount realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received." 26 U.S.C.A. § 111(a, b).

right given by the purchaser to receive unascertainable amounts payable annually based on future production of iron ore. The cash consideration was less than the taxpayer's stock investment. It was held that the amounts received under the contract were not to be taxed until the taxpayer's capital investment had been paid off. The transaction was not a closed one because, as the Supreme Court of the United States said, "As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit."

Appellant seeks to distinguish the Logan case in that it involved a direct sale and not a corporate distribution, as here. It is pointed out that § 115(c) of the Internal Revenue Code states, "Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, * * *" and that in the instant case the taxable sums were not distributed in liquidation, but were paid because of the obligation of a third party. Hence, it is argued, the facts of this case do not permit the money received to be treated as a sale or exchange, which is the statutory foundation for the rule in Burnet v. Logan, supra. We do not agree.

As we have pointed out, if the contract in question had an ascertainable value, that amount would certainly be an "amount distributed in complete liquidation." The payments in this case arose directly out of the contract, which had a substantial value, and may be said to be "amounts distributed" within the purview of § 115(c), thus falling squarely within the holding in Burnet v. Logan, 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143. Distributions under § 115(c) are treated in the same manner as sales. In any event, it is clear that the contract itself was a distribution under § 115(c). Its taxable valuation is its fair market value, according to § 111(b) of the Internal Revenue Code. Although there was no ascertainable fair market value at the time of liquidation, we find nothing in the statute

requiring the market value to be measured immediately. In such a situation the only practicable and accurate method of measuring the contract's value is through the application of money to such valuation as it is received. The alternatives are to ascribe a fictitious or speculative value to the property, which was condemned in the Logan case, or to allow it no value, as urged by appellants. Such methods result in inaccuracies and inequities. We think the proper procedure is to measure the value of the contract as payments are received.

In Commissioner v. Carter, 2 Cir., 170 F. 2d 911, a case which presents a factual situation almost identical with that of the instant case, the second circuit held that payments received under circumstances similar to payments made pursuant to the contract in question here should be taxed as capital gain. We think the payments in question here should be so treated and affirm the judgment.

Judgment affirmed.

APPENDIX G

These Cases Represent Decisions in Which the Open Transaction Doctrine Established in Burnet v. Logan, supra, Has Been Recognized.

Boudreau v. *Commissioner of Internal Revenue*, 45 BTA 390, (1941), Aff'd. 134 F. 2d 360 (CA-5, 1943).

Bradford v. *Commissioner of Internal Revenue*, 22 TC 1057 (1954).

Brown v. *Commissioner of Internal Revenue*, 26 BTA 781 (1932).

L. H. Burnet, Para. 56-210 P.-H. Memo. TC (1956).

Cluff v. *Commissioner of Internal Revenue*, 17 TC 225 (1951).

Columbia Oil & Gas Co. v. *Commissioner of Internal Revenue*, 41 BTA 38, Aff'd. 118 F. 2d 459 (CA-5, 1941).

Commissioner of Internal Revenue v. *R. J. Darnell, Inc.*, 18 BTA 125, Aff'd. 60 F. 2d 82 (CA-6, 1932).

Commissioner of Internal Revenue v. *Garber*, 50 F. 2d 588, (CA-9, 1931).

Commissioner of Internal Revenue v. *Moore*, 48 F. 2d 526 (CA-10, 1931).

Curtis v. *Commissioner of Internal Revenue*, 26 BTA 1103, (1932).

Dearing v. *Commissioner of Internal Revenue*, 36 BTA 845, (1937).

Deering v. *Commissioner of Internal Revenue*, 40 BTA 984, *Aff'd.* 102 F. 2d 91, (CA-5, 1939).

Dickey v. *Burnet*, 56 F. 2d 917 (CA-8, 1932).

Edwards Drilling Co. v. *Commissioner of Internal Revenue*, 35 BTA 341, Aff'd. 95 F. 2d 719 (CA-5, 1938).

Estate of Raymond T. Marshall, 20 TC 979 (1953).

Gatliff v. *Helburn*, 31 F. Supp. 495, D.C. E.D. Ky. (1940).

Gould Securities Co. v. *United States*, 96 F. 2d 780 (CA-2, 1938).

E. P. Greenwood v. *Commissioner of Internal Revenue*, 34 BTA 1209 (1936).

Helvering v. *Drier*, 79 F. 2d 501 (CA-4, 1935).

Helvering v. *Walbridge*, 70 F. 2d 683 (CA-2; 1934).
Hewitt v. *Commissioner of Internal Revenue*, 30 BTA 962 (1934).
Hobbs v. *Commissioner of Internal Revenue*, 26 BTA 241 (1932).
Hofferbert v. *Briggs*, 178 F. 2d 743 (CA-4, 1949).
Hopkinson v. *Commissioner of Internal Revenue*, 42 BTA 580, Aff'd. 126 F. 2d 406 (CA-2, 1942).
Lloyd v. *Commissioner of Internal Revenue*, 33 BTA 903 (1936).
Ludorff et al. v. *Commissioner of Internal Revenue*, 40 BTA 32 (1939).
Nicholson v. *Commissioner of Internal Revenue*, 3 TC 596 (1944).
North American Oil Consolidation v. *Burnet*, 286 U.S. 417 (1932).
O'Brien v. *Commissioner of Internal Revenue*, 25 TC 376 (1955).
O'Donnell v. *Commissioner of Internal Revenue*, 25 BTA 962 (1932); Aff'd. 64 F. 2d 634.
Peck v. *Commissioner of Internal Revenue*, Para. 52-203 P.-H. Memo. T.C.
Perry v. *Commissioner of Internal Revenue*, 152 F. 2d 183 (CA-8, 1945).
Potter v. *Commissioner of Internal Revenue*, Para. 48-529 P.-H. Memo. T.C.
Remer v. *Commissioner of Internal Revenue*, 28 T.C. 85, Aff'd. 260 F. 2d 337 (CA-8, 1958).
Reynolds v. *McMurray*, 60 F. 2d 843 (CA-10, 1932).
Rocky Mountain Development Co. v. *Commissioner of Internal Revenue*, 38 BTA 1303 (1938).
Shaffer v. *Commissioner of Internal Revenue*, 29 BTA 1315 (1934).
Smaltz v. *McCaughn*, 5 F. Supp 204 (E.D. Penn. 1933).
Speyer v. *Commissioner of Internal Revenue*, 30 BTA 517, Aff'd. 77 F. 2d 824 (CA-2, 1935).

Steinbach Kresge Co. v. Sturgess, 33 F. Supp. 897 (D.C. N.J. 1940).

Edward G. Swartz, Inc. v. Commissioner of Internal Revenue, 69 F. 2d 633 (CA 5, 1934).

United States v. Jones, 194 F. 2d 783 (CA-10, 1952).

Wells Amusement Co. v. Commissioner of Internal Revenue, 70 F. 2d 208 (CA-4, 1934).